

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ABDUL-KAHLIF CALHOUN,
Petitioner,
vs.
DOUG WADDINGTON,
Respondent.

Case No. 09-5211-RJB-JRC

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creature. Dkt. 24. The Court has considered the Report and Recommendation and the record herein.

The Report and Recommendation thoroughly discusses the facts and law at issue here, and it should be adopted. The petitioner raises four constitutional grounds for review: first, that petitioner's right to assistance of counsel was deprived; second, that Wash. Rev. Code § 9.94A.589(3) violated the petitioner's equal protection rights; third, that the failure to give *Miranda* warnings at the time of the petitioner's arrest violated his Fifth and Fourteenth Amendment rights; and fourth, that the search and seizure that led to his conviction violated his Fourth Amendment rights. Dkt. 24 at 7.

As to the first two grounds, the Report concludes that the petitioner exhausted his state court appeals, but that both grounds lack merit. *Id.* at 10-14. As to the second two grounds, the Report concludes that the petitioner has not exhausted his opportunities to appeal the issues to the state courts. *Id.* at 14-15. On these bases, the Report recommends denying the petitioner's writ of habeas corpus.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

2 The district court should grant an application for a Certificate of Appealability only if the petitioner
3 makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). To obtain a
4 Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner must make a showing that
5 reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different
6 manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
7 *McDaniel*, 529 U.S. 473, 482-85 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).
8 When the court denies a claim on procedural grounds, the petitioner must show that jurists of reason
9 would find it debatable whether the petition states a valid claim of the denial of a constitutional right and
10 that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
11 *Id.* at 485.

DISCUSSION

13 The Report recommended dismissal of the first two grounds of the petition as being without merit.
14 There is nothing in the record to suggest that reasonable jurists would debate whether the petition should
15 have been resolved in a different manner, and the issues presented do not deserve encouragement to
16 proceed.

17 The Report recommended dismissal of the second two grounds of the petition as unexhausted.
18 That portion of the petition is therefore being dismissed on procedural grounds. There is nothing in the
19 record that would support a conclusion that jurists of reason would find it debatable whether the petition
20 states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable
21 whether this court is correct in its procedural ruling. The Certificate of Appealability should be denied.

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The Court hereby FINDS and ORDERS:

- (1) The court adopts the Report and Recommendation (Dkt. 24);
- (2) Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 11) is DENIED;
- (3) A Certificate of Appealability in this matter is DENIED; and
- (4) The Clerk is directed to send copies of this Order to plaintiff, all attorneys of record, and to the Hon. J. Richard Creatura.

DATED this 18th day of November, 2009.

Robert J. Bryan
P. 1 of 4, L.P.

Robert J. Bryan
United States District Judge